

IN THE MATTER OF THE POLICE ACT, R.S.B.C. CHAPTER 367

AND

IN THE MATTER OF A DISCIPLINE PROCEEDING UNDER SECTION 124

AND

IN THE MATTER OF ALLEGATIONS OF MISCONDUCT AGAINST

[REDACTED]

AND

[REDACTED]

OF THE VANCOUVER POLICE DEPARTMENT

To:	[REDACTED]	Member
And To:	[REDACTED]	Member
And To:	Mr. Clayton Pecknold	Commissioner
AND TO:	[REDACTED]	Investigator
AND TO:	[REDACTED]	Complainant

DISCIPLINE AUTHORITIES FINDINGS AND REASONS UNDER SECTION 125(1)(b)

(Supplement to Form 3)

On the 7th of December, 2018 [REDACTED] and [REDACTED] were doing routine patrols in the area of Burrard and Smythe Street in Vancouver when the complainant, [REDACTED], came to their attention. The officers say that he was wandering across

the intersection in an aimless manner and was not within the marked crosswalk. They decided to stop him thinking they might write him a ticket for jaywalking or being drunk in a public place. Almost immediately upon beginning to address the complainant, the officers became concerned about his body language which they found threatening. They grabbed his arms, took him to the ground and arrested him for a breach of the peace.

█████ filed a complaint and The Police Complaint Commissioner (PCC) initiated an investigation pertaining to allegations of wrongful arrest and the use of unnecessary force. The Final Investigation Report was delivered on July 15th, 2019. The discipline authority delivered his Section 112 notification, finding the allegations not to be substantiated, on August 7, 2019. On September 3rd, 2019, the PCC appointed me to undertake a Section 117 review of that finding. The Section 117 decision was delivered on September 12th, 2019. In addition to finding that the two allegations that were the subject matter of the Final Investigative Report and the notification by the discipline authority appeared to be substantiated, I found that it was likely that █████ and █████ had committed misconduct by neglecting to provide █████ with his rights under section 10(b) of the *Canadian Charter of Rights and Freedoms* when they were required by law to do so.

The officers were each offered a prehearing conference but chose instead to proceed directly to a S124 Disciplinary Hearing. That hearing commenced on November 8th, 2019 and was adjourned to November 14th, 2019 when I heard evidence from both █████ and █████ Submissions on behalf of █████ were delivered on December 12th, 2019.

ALLEGATIONS

In my section 117 review I determined that the following misconduct as against both officers appeared to have been substantiated:

1. Misconduct: *Abuse of Authority* pursuant to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest without good or sufficient cause
2. Misconduct: *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person.

3. Misconduct: Neglect of Duty pursuant to section 77(3)(m)(ii) of the *Police Act* pertaining to the failure to advise [REDACTED] of his rights under Section 10(b) of the *Canadian Charter of Rights and Freedom*

FINDINGS AND REASONS AS THEY PERTAIN TO [REDACTED]:

At the hearing of this matter on November 14th, 2019, I was provided with evidence relating to the respective roles and responsibilities of police recruits and their field supervisors.

On December 7th, 2018, when [REDACTED] was involved in detaining and then arresting [REDACTED], he was a recruit who had been on duty only three months. [REDACTED] had been assigned as his field supervisor. While giving evidence in these proceedings, [REDACTED] was asked whose responsibility it was to ensure that a recruit was carrying out his powers of arrest, detention and seizure lawfully. He explained that responsibility would be solely his. Since [REDACTED] was acting under the direction and supervision of [REDACTED] I do not find him responsible for the misconduct, if any, arising from the arrest of [REDACTED]. The force used by [REDACTED] was only that which was necessary to assist his supervisor in effecting the arrest. Finally, it was [REDACTED] not [REDACTED] who bore the responsibility of ensuring that the complainant was advised of his charter rights.

In summary then, the additional information provided during the Section 124 hearing of this matter has persuaded me that the three allegations of misconduct against [REDACTED] are unsubstantiated.

FINDINGS AND REASONS WITH RESPECT TO [REDACTED]

In explaining his reasons for concluding that there were the requisite grounds to arrest [REDACTED] for a breach of the peace, [REDACTED] reported that the complainant had puffed up his chest in what he interpreted as a pre-assaultive stance. At first his clenched hands were at his side but then he suddenly thrust his hands into his pockets. Vancouver Police Policy 1.4.4 accurately reflects the law as it relates to an apprehended breach of the peace. It states:

Police Officers have a common law power of arrest for an "apprehended breach of the peace". This occurs when the police officer has not witnessed a breach of

the peace, but the officer believes on reasonable grounds that a breach will take place unless an arrest is effected. Further, the apprehended disturbance or threat must be serious enough to cause a reasonable belief that, if the police do not intervene, a more serious problem will result involving personal injury or damage to property. The apprehended breach of the peace must be imminent and the risk that the breach will occur must be substantial.

The evidence on the S.124 hearing was instructive. In most regards it was the same as what had been included in the police statements but there were some significant pieces of additional information provided. [REDACTED] when he had parked and exited the police cruiser saw [REDACTED] and the complainant talking. He noted that [REDACTED] was definitely in [REDACTED] personal space; they were almost touching. He said that the complainant was approaching [REDACTED] but upon further questioning explained that he did not mean that the complainant had taken a step but that he was leaning his body forward. [REDACTED] agreed with this description of the uncomfortably close proximity he and the complainant had found themselves in. They were in each other's faces and in the circumstances, it was not surprising that both of them felt threatened. Further questioning established the fact that this unfortunate positioning had occurred accidentally. [REDACTED] had been moving at a jog and calling for the complainant to stop. When [REDACTED] finally stopped and turned around, [REDACTED] was taken by surprise. He drew to a halt but was already much too close to have a comfortable conversation. [REDACTED] seeing the situation, immediately intervened to distract the complainant. He demanded to know why [REDACTED] had been jaywalking and why he had given them the finger. This was not the kind of communication that would be likely to defuse the situation but he says it was just the first thing that came into his mind. It seemed to work in that he got the complainant's attention. Unfortunately, [REDACTED] response then was to "shoot" his hands into his pockets.

In his statement, [REDACTED] said that due to [REDACTED] unpredictability and challenging behaviour, he took control of [REDACTED] left hand while [REDACTED] controlled [REDACTED] right hand. He then told [REDACTED] to put his hands behind his back because he was being apprehended for breach of peace. [REDACTED] confirms the series of events The fact that he

had puffed up his chest and then thrust his hands into his pockets did not, in my view, amount to reasonable grounds to believe that, if not apprehended, there was an imminent and substantial risk that [REDACTED] would cause personal injury or damage to property.

During the course of his evidence on November 14th [REDACTED] explained the safety concerns raised when a suspect puts his hands in his pockets when the officers do not know what, if anything, he might have there. He and [REDACTED] had each grabbed one of the complainant's arms, not to apprehend him for a breach of the peace, but to control his hands so as he removed them from his pockets, they could be sure that they were empty.

He explained this as follows:

Q. And to your thinking what was the plan for the next second or two when you had his -- you were controlling his hands, which were still in his pocket?

A Just to control to take it out of his pocket.

Q Okay. And if you had been able to control his hands while they're coming out of his pockets, without incident, and you're able to see that he had nothing in his hands, what would have been the next step?

A We would have advised him not to place his hands inside his pockets, and told him -- tell him not do that again, and we would continue to proceed with our stop for jaywalking.

The situation had been overheated throughout because of the close proximity the parties found themselves in and when the officers suddenly grabbed his arms, the complainant actively resisted. He began struggling, yelling at the officers and also attempted to drive his elbow into [REDACTED]'s midsection. It was at this point that [REDACTED] made the decision to apprehend him for a breach of the peace. Had he

calmed down they would have continued with their investigation and then allowed him to leave but from the point when they first laid hands on him until he was placed in the police transport van, [REDACTED] remained belligerent.

Given this supplemental information with respect to the reason for the first physical contact with the complainant as well as with respect to when the decision to apprehend was made, I find that there were sufficient grounds for the apprehension and that allegation 1, which provides that [REDACTED] abused his authority pursuant to section 77(3)(a)(i) of the *Police Act* by intentionally or recklessly making an arrest without good or sufficient cause, is not substantiated.

USE OF FORCE

In my decision under S.117, I did not make findings of credibility as between the complainant and the officers because based on [REDACTED] and [REDACTED] own evidence it appeared that a finding of misconduct had been established. While I do not dismiss the totality of [REDACTED] evidence, he does not recall being arrested, being handcuffed or having contact with a second officer during that process. He says he lost consciousness and by the time he came to there were several officers and police vehicles around him. He reports that the first officer who approached him, (this would be [REDACTED] made a comment about the fact that he hadn't stopped and then punched him in the face and head four times. It was then, he says, that he dropped onto one knee and things went blurry. [REDACTED] and [REDACTED] both say that while [REDACTED] approached the complainant first, [REDACTED] was at his side almost immediately. They say their first physical contact with the [REDACTED] was when they grabbed his arms. They then tried to handcuff him and when he resisted, they swept his feet out from under him so they could get him on the ground and complete that process. They say he continued to struggle and at that point, [REDACTED] acknowledges punching him in the head or face on about three occasions. There would be no motive for [REDACTED] to approach a jaywalker in the aggressive manner the complainant describes nor can I believe that [REDACTED] who had worked with [REDACTED] only a short time, would conceal this kind of assaultive behaviour and then report that he was the one who had struck [REDACTED]. For these reasons, I find, on a balance of probabilities that the complainant's version of the events surrounding his arrest is inaccurate and I accept the evidence of [REDACTED] and [REDACTED].

In the section 117 decision in this case I found that [REDACTED] and [REDACTED] were justified in detaining [REDACTED] for investigative purposes. In reaching that conclusion, I relied on the decision of *R.v Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52. The court in that case also ruled that where a police officer has reasonable grounds to believe that his safety or the safety of others is at risk, he has the authority to do a protective pat down search of the detained individual. In my view, the officers' efforts to take control of [REDACTED] hands and remove them safely from his pockets fall into this category of intrusion.

When the complainant became actively resistant and attempted to strike [REDACTED] the decision was made to apprehend him and for a breach of the peace. Since he was still fighting off their efforts to place him in handcuffs, the officers acted reasonably when they took him to the ground to gain control. There the complainant continued to resist vigorously and once again attempted to strike [REDACTED] with his elbow. Together, [REDACTED] and [REDACTED] had still not managed to get the handcuffs onto his wrists. At this point, [REDACTED] struck the complainant in the face with a closed fist. He said that the intent was to cause a temporary motor disfunction. The move was not immediately effective so he struck him again. There may have been a third blow. Finally, the officers succeeded in securing the complainant's hands.

Examining [REDACTED] decision having reference to the *National Use of Force Model*, I find that [REDACTED] was assaultive and actively resistant throughout the time that the officers were attempting to place him in handcuffs. Communication and softer physical controls were tried but were not effective. Hard physical control, such as the punches that were administered are within the range of proportionate responses set out in the model. Accordingly, I find the allegation that [REDACTED] used unnecessary force is not substantiated.

CHARTER BREACH

[REDACTED] thinks that he told [REDACTED] to provide the complainant with his rights under section 10(b) of the *Canadian Charter of Rights and Freedoms*. [REDACTED] does not recall receiving these instructions and with the passage of time, [REDACTED] can no longer be sure he gave the direction. Neither of them read [REDACTED] his rights and [REDACTED] says

that whether he had delegated the task to [REDACTED] or not the responsibility of ensuring compliance with the Charter was his alone.

Counsel for [REDACTED] has cited the decision of Myers J in *Lowe v Diebolt*, 2013 BCSC 1092 as authority for the proposition that a Charter breach does not necessarily amount to misconduct as set out in section 77 of the *Police Act*. That decision dealt with an allegation of abuse of authority under section 77(3)(a)(ii)(B). Abuse of authority is defined in the Act as follows:

- (a... oppressive conduct towards a member of the public, including, without limitation,
 - (i) intentionally or recklessly making an arrest without good and sufficient cause,
 - (ii) in the performance, or purported performance, of duties, intentionally or recklessly
 - (A) using unnecessary force on any person, or
 - (B) detaining or searching any person without good and sufficient cause, or
 - (iii) when on duty, or off duty but in uniform, using profane, abusive or insulting language to any person including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic and social status;

In the *Lowe v Diebolt* decision, the court said:

The petitioner's conflating the legality of the search and misconduct under s. 77(3)(a)(ii)(B) is shown starkly in his argument... The question of misconduct is different from whether a Charter breach occurred, and also from whether evidence obtained from an illegal search should be excluded. *That is clear from the definition of the charged misconduct, which requires recklessness or intent.* (emphasis mine.) He goes on to say that the failure to provide a Charter warning was more in line with negligence.

With respect, I believe that it exactly the type of lapse addressed by section 77(3)(m)(ii) "neglect of duty", which is neglecting, without good or sufficient cause, to do any of the following:

(ii) promptly and diligently do anything that it is one's duty as a member to do

Accordingly, I find that the allegation of misconduct relating to [REDACTED]'s failure to ensure that [REDACTED] was read his Charter rights is substantiated.

NEXT STEP

Pursuant to Section 125(1)(d) the member may make submissions regarding disciplinary or corrective measures. Pursuant to Section 125(2), those must be submitted within 10 days business days of the member receiving a copy of the Form 3 in this matter.

Dated at Surrey British Columbia this 20th day of December, 2019.



Carole D. Lazar
Adjudicator